No. 93-349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
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EDWIN W. MUGFORD, III,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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EDWIN W. MUGFORD, III v. UNITED STATES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATION DISCLOSURE STATEMENT

First Union National Bank, Successor in interest to Florida National Bank, a victim

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MISCELLANEOUS

Supreme Court Rule 15 2

I. *MISSTATEMENTS IN OPPOSITION BRIEF*

There are misstatements of fact in the opposition brief. Contrary to the government's assertions at page 2 that Mugford's employment began at or about the time of the commencement of the conspiracy in January 1985, the evidence did not establish his employment at Royal Buick until the spring of 1986 (R42-pp. 5-22).

The opposition also takes out of context testimony referred to as "other evidence" supporting the convictions. No evidence was presented from which it could be reasonably inferred Mugford discussed illegal acts with others to further the conspiracy, falsified loan applications, or engaged in any illegal acts (Opp.Br., pp. 2, 4, 8 n.3, 13, 14 & n.6).[1]

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[1] Wilkerson, Scarborough and McMillen gave testimony which the government contends establishes "other evidence" of Mugford's guilt. Although it is a well-settled legal principle that

on appeal, all reasonable inferences of fact are to be construed in the light most favorable to the government, the natural corollary which evolves from that principle is that unreasonable inferences and distortions of the record are not permitted. *See*, Supreme Court Rule 15. Notwithstanding the government's "spin," the record does not support the contentions in the opposition brief.

Wilkerson testified that Mugford would have "had occasion to attend" sales meetings at which the falsification of credit applications was discussed, but did not place him at any of them (R18-p.70). He further testified the meetings he referenced might have occurred in 1985 (R19-p.42), which pre-dated Mugford's employment in the Spring, 1986 (R42-pp.5-22).

Though Wilkerson could not recall the customer or find the credit application among the files admitted into evidence, he also claimed he saw Mugford add a second job or income to a credit application that he (Wilkerson) found "creative" (R18-p.72). That testimony is incredible because the government could not produce a single credit application attributable to Mugford with a second job or income.

Scarborough (a manager, not a salesman) did not testify that he discussed a credit application with Mugford in which Mugford said "to put a VISA on it or give him some credit." Op.Br., p. 13. A review of Scarborough's testimony reveals (R21-pp.37,38) he was discussing an application with another salesman on the showroom floor. In the context of the "joking" among salesman about which Scarborough was then testifying, Mugford's comment was at most a casual remark of no probative value. *See*, ***United States v. Urbanik***, 801 F.2d 692, 698 (4th Cir.1986) [holding "not harmless error" to admit under Rule 801(d)(2)(E) "casual aside" that touches upon but does not "further" conspiracy].

The testimony of McMillen (R16-pp.29,30) also was not correctly put forth in the opposition brief. Rather than show Mugford's participation in the conspiracy, McMillen's testimony tends to disprove it. Moreover, while acknowledging he discussed falsification of credit applications with other employees of Royal Buick, he

That this "other evidence" was not a factor in the convictions is evident in the exchange between the district court and the prosecutor at the close of the government's case-in-chief when the court was considering Mugford's Rule 29 motion for judgment of acquittal. After hearing the court's summation of the evidence against Mugford (consisting only of the false statements appearing in the credit applications), and its inquiry, "How could the jury conclude ... beyond a reasonable doubt ... that the [false] entries ... were the figments of [Mugford's]

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specifically denied any such discussion with Mugford.

The government's references to the "rebates" and other charges as being indicative of Mugford's guilt is misstated. The government's evidence at trial established the salesmen had no role in the rebates and the "add-ons." Rebates and other "add-ons" to the final amount financed were by the managers (R19-pp.7,8; R18-p.76; R21-pp.74,77; R23-p.66), were located on the lowest part of the credit application reserved specifically to the F & I department, and written in a different hand than the rest of each application.

imagination as distinguished from that of the customer?", the prosecutor replied:

> "... **we suggest the jury can certainly infer that when false information is placed on the loan applications * * * *that the salesmen* [*sic*] *did it* pursuant to the scheme to defraud and the conspiracy." (R38-pp. 58-60)[emphasis added].

Neither during the course of this argument to the court, nor in its closing argument to the jury (R45-pp.12, 15-17), did the government make reference to this "other evidence." It relied solely on the false entries in the credit applications to support the charges in the indictment against Mugford.

I. *THE CREDIT APPLICATIONS WERE NOT ADMISSIBLE AS NON-HEARSAY*

The government admits there exists a split among the circuits as to the admission of the credit applications under Rule 803(6). It does not refute, and

apparently concedes, the trial court erred in admitting the nine credit applications pursuant to the business records exception to the hearsay rule because the source of the information (the customer) was not acting in the regular course of business.[2] It also abandoned its argument in the Court of Appeals--that the credit applications were otherwise admissible as hearsay exceptions under Rules 801(d)(2)(D) and 801(d)(2)(E).[3] The government contends the applications were admissible as non-hearsay because they were not offered in evidence for the truth

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[2] Brief in Opposition, pp. 8-9: "Petitioner is correct that other courts of appeal have held that documents are not admissible under the business records exception if any participant in the production of the record is not acting within the regular course of the his business's activity, and that the business records exception does not apply to an entire business record when some of the information in it is based on statements of persons not acting in the regular course of that business." [Citations omitted]

[3] Brief of Appellee, p.107. (C.A. 11th Cir.).

of the matter asserted. Nothing could be further from the truth because that was precisely the reason the evidence was offered, and how it was used to convict! *Supra.*, p. 4.

A review of the record proves the government sought introduction of the files and the credit applications pursuant to the business records exception by laying a foundation to qualify Wilkerson as a non-custodial witness under Rule 803(6), F.R.Ev. (R17, pp. 163-172).[4] Moreover, both in arguing against a judgment of acquittal and in its final speech to the jury, the government

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[4] Contrary to the government's assertion, there was objection to the admission of the documents on that basis. By pre-trial order and agreement of counsel, Mr. Winkles, counsel for Royal Buick, was designated to be lead counsel for all defendants. The court specifically stated that objections made by Mr. Winkles would be deemed adopted by all other defendants unless a particular defendant specifically made known to the court his intent to not ally himself with the objection. Mr. Winkles' objection appears in the record (R17-pp.169,170).

referred only to the credit applications in support of the charges subject to this appeal, *ibid.*, because there was no evidence other than his name as salesman on the credit applications to connect Mugford to the fraud alleged in the indictment!

Mugford does not dispute the credit applications contained false statements. But that fact alone does not make them admissible as non-hearsay. The government misplaces its reliance on that argument (and upon the cases in recites in support) for the simple reason that there was no evidence demonstrating ***who, other than the customer,*** made the false statements contained in the eleven credit applications. In each and every case cited in opposition where evidence was admitted as non-hearsay (to prove the falsity of a statement or assertion) there was no

question of the identity of the declarant.

Contra, the facts of this case where the identity of the declarant of the false information was never proved to be the defendant against whom they were used to convict. *Authorship of the false entries in each of the credit applications is the critical question the government left unanswered at trial.* The question remained unanswered in the court of appeals, and in the brief in opposition to this petition. The government has not pointed to a single decision in which an oral or written declaration made out of court has been deemed admissible substantive evidence against a defendant when the identity of the declarant has not first been established because no such holding exists.

For that reason, the testimony of the introduction witness, Wilkerson, was

insufficient for the admissibility purposes the government claims. Wlkerson's testimony was speculative on the point, suggesting the false information in the credit applications may have originated from either of three sources: 1) the customer providing the information to the salesman; 2) the salesman; or 3) some other person at the dealership with access to it.

Moreover, the presumption that the customer was the source of the falsity is particularly strong in Mugford's case. Each of the eleven "Mugford" credit applications was signed by the customer attesting that the information was accurate and complete.[5] Admitted for any purpose, on their face the applications

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[5] Each standard application form contained the following statement, immediately above a line for the customer's signature: "You certify that the above information is accurate and complete..."

purport to be the declarations of the customer, and Wilkerson's testimony supports that premise. None of the customers was indicted, and none of the nine whose credit applications relate to the convictions appealed were called to testify.

It logically follows that to be admissible as non-hearsay evidence, the relevance of each of the credit applications to the charges had to appear either on the face of the credit application itself or be shown by other evidence. The credit applications themselves were not sufficient for that purpose. Neither was Wilkerson's testimony alone, nor the remaining documents in the files.[6]

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[6] The government maintains the other documents in the file were admissible under Rule 803(6). These documents were not relevant evidence against Mugford for similar reasons as the credit

The appearance of his name as salesman in the nine documents was the only link between Mugford and the false statements in the credit applications forming the basis of his convictions. Had these documents not been admitted, or their use properly limited by the court, it would not have been possible for the jury to convict Mugford. Therefore, their admission without a limiting instruction [7]

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applications were not. Only Mugford's name in the documents linked him to them, nothing else. Given Wilkerson's testimony that the documents were prepared from the information on the credit application supplied by the customer, they contain inadmissible double hearsay.

The government's reliance on the similarity of the handwriting and signatures in the various papers to prove Mugford's involvement is inconsistent with its own concession that another salesman completed the Burns application, though the handwriting in all eleven has also been referred to by the government as "similar" and "distinct." Also, its own witness, Mosley, did not identify Mugford as the salesman with whom he dealt when afforded the opportunity at trial.

[7] *See* ***United States v. Evans***, 572 F.2d 455, 490 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978), *cited* at p. 8, Op.Br., holding that introduction of large groups of exhibits at once "not unfair"

was not harmless, but "particularly egregious," resulting in "a miscarriage of justice." *United States v. Olano*, 113 S.Ct. 1770, 1790 (1993); *United States v. Frady*, 456 U.S. 152, 163 & n.14 (1982).

II. *SIXTH AMENDMENT VIOLATIONS*

The government contends no Confrontation Clause issues exist because the credit applications were not used to prove the matters asserted, Mugford had the right to cross-examine the introducing witness, and the remaining file documents were properly admissible under Rule 803(6). Op.Br., pp. 11-13. Its reasoning is flawed because its supporting case authority does not apply to the facts of this case.

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when trial court made clear that introduction *en masse* was conditioned upon defense counsel's right to object at a later time to the admission of any specific document, and the jury was properly instructed as to the weight to be given to each such document.

First, the credit applications lacked the requisite "indicia of reliability" with which "firmly rooted" exceptions to the hearsay rule are clothed. These documents, the crucial evidence to the convictions, were *improperly admitted for that reason*.

Second, merely having the right to confront the introducing witness does not cure the problem raised here. Wilkerson's testimony did not link Mugford to the credit applications, to the falsification of them, or to the conspiracy itself. Moreover, Mugford did successfully refute Wilkerson's testimony in significant part. On cross examination, Wilkerson could not identify or produce (and neither could the government) the credit application to which he claimed he saw Mugford add a "creative" second job or income, nor could he place Mugford at the sales meetings

falsification was discussed. The government never referred either in argument or in closing to Wilkerson's "other evidence" in ascribing guilt to Mugford. The prosecution relied only upon the credit applications and the implied hearsay each contained.

This was exactly the question posed by the admission of 57 credit cards receipts in *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982). *See*, Pet., pp. 38-42, 46-47. Those credit card receipts also were admitted for the "falsity" of the information they contained (the customers' signatures) without the customer's testimony. The opposition brief avoids any reference to that holding; perhaps for the obvious reason that the Arizona Supreme Court found fundamental error affecting the defendant's right to confront the witnesses by the admission

(through a third party without first-hand knowledge of the fraud) of documents the accused may or may not have falsified. In ***McGann***, as in this case, the admission was wrongful for the hearsay implied in the documents. In both instances, the jury was allowed to infer improperly from the combination of two unrelated factors (the charge against the accused and the absent customer) that the accused falsified a document and violated the law. The result was more egregious in Mugford's case than in ***McGann*** because of the lack of "other evidence" of Mugford's wrongdoing.[8]

The "application of a recognized hearsay rule exception does not necessarily evidence compliance with the

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[8] In ***McGann*** there was testimony from a customer that the signatures on four other credit card receipts were not his, nor authorized by him. No such customer testimony existed in this case. Moreover, in this case, the two customers called by the government did not tie Mugford to the falsification of their credit applications.

Confrontation Clause." *United States v. Adams*, 446 F.2d 681, 683 (9th Cir.), *cert. denied*, 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 257 (1971). Nor has this Court, as the government implies, held that admission under a well-recognized hearsay exception satisfies Confrontation Clause problems. In fact, this Court has expressly rejected such a construction.[9]

The fact remains that given the opportunity to cross-examine the customer witnesses about the source of the false information in their credit applications, Mugford was able to establish his innocence as to those transactions. His convictions flow from the nine instances

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[9] *See California v. Green*, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1934 (1970), wherein it is said, "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. [citations omitted]"

in which he was not afforded that opportunity by the government.[10] Under such circumstances, the opposition's position that there are no Confrontation Clause issues raised is without merit.

III. *THE EVIDENCE WAS INSUFFICIENT*

As stated in page 1 & n. 1, *supra.*, there was no "other evidence" to support the convictions. The loan applications do not prove Mugford was the salesman

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[10] Because the burden is on the government to prove each and every element of the offense charged, ***Sullivan v. Louisiana***, 113 S.Ct.2078 (1993), requiring an accused to subpoena the hearsay declarant if the government does not produce him shifts the burden of proof to the defendant and is inconsistent with the constitution's "preference for face-to-face encounters at trial," ***Ohio v. Roberts***, 448 U.S. 56, 63 (1980). It is respectfully suggested the abuse of the business records exception in this case vindicates Judge Coleman's holding in ***Park v. Huff***, 493 F.2d 923, 933-934 (5th Cir.1974), ***reversed on rehearing en banc*** (six justices dissenting), 506 F.2d 849, ***cert. denied*** 423 U.S. 824 (1975), that "the burden of producing witnesses to meet the accused's right of confrontation falls on the State." Judge Coleman sagely reasoned that is the sure way to prevent the government from hiding a weak case and avoiding the risk the testimony of the declarant would exculpate the accused.

involved merely because his name appears on them as the salesman. ***United States v. Lieberman***, 637 F.2d 95 (2d Cir.1980). Recognizing this, the government called Burns and Mosley to prove Mugford falsified their credit applications and thereby lay a foundation to argue that he falsified the remaining nine, without having to call the other customers to testify.

The government admits its failure to prove not only Mugford's guilt on the Burns and Mosley applications, but even his connection to them.[11] Inexplicably, while conceding another salesman completed the Burns application, the government still maintains that the same, distinctive handwriting and signatures, appearing on all eleven credit applications (including

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[11] See footnote 2, page 6, Brief in Opposition.

Burns'), proved Mugford was the source of the false information on the remaining nine in which no customer testimony or other evidence was offered linking them to Mugford. Br.Opp., p. 14.

The contrary would appear to be proved by that admission, for if the same hand which wrote the Burns application wrote the remaining nine, it follows that Mugford did not write the nine at issue.

A reasonable jury, having found reasonable doubt that Mugford falsified the Mosley and Burns applications, was required to find reasonable doubt as to the other charges for which there was no other evidence presented.

CONCLUSION

The opposition's reliance on the admissibility of the credit applications and its contentions that "other evidence" existed to sustain the convictions are

specious, and inconsistent with the facts and of the applicable law. Petitioner's convictions of conspiracy and fraud were the result of the improper admission of the credit applications and other documents, the denial of his right to confront the customers in the nine transactions at issue, and the jury's impermissible inferences that were inconsistent with the evidence presented.

As a result, an innocent man was convicted of crimes he did not commit. For these reasons, the petition should be granted.

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